

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PERLINE THOMPSON et al.,

Plaintiffs,

VS.

UNITED STATES OF AMERICA et al.,

Defendants.

3:18-cv-00147-R CJ-WGC

ORDER

This cases arises out of various disputes concerning the tribal government of the Duckwater Shoshone Tribe (“the Tribe”). Pending before the Court are two motions to dismiss and a motion to reconsider the dismissal of several Defendants for failure to timely serve them. For the reasons given herein, the Court grants the motion to reconsider in part and grants the motions to dismiss, with leave to amend in part.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs argue that the United States, through the Bureau of Indian Affairs (“BIA”) and other agencies and agents, has “interfere[d] with the judicial processes and election activities of the Duckwater Shoshone Tribe” and failed to “recogniz[] the entire elected tribal council.” Plaintiffs complain that federal Defendants have failed to intervene in various tribal disputes, and that the Tribe wrongly imprisoned several persons, but no such person is alleged to currently be in custody—it appears all Plaintiffs previously incarcerated were held only for a few days.

1 Seven Plaintiffs have sued the United States, the BIA, the Western Nevada Agency of the
2 BIA (“WNA”), the Eastern Nevada Agency Superintendent, the Phoenix Area Director, the
3 Intertribal Council of Nevada, and nine individual Defendants in this Court. Plaintiffs list four
4 counts: (1) an APA challenge to the BIA’s approval of Ordinance 83-D-01; (2) an ICRA claim
5 based on various Defendants’ denial to Plaintiffs of a venue to file appeals from tribal court
6 decisions by withholding funding for the Intertribal Court of Appeals; (3) an ICRA claim based
7 on various Defendants’ alleged corrupt political practices relating to tribal electoral and judicial
8 practices; and (4) a declaratory judgment claim seeking five declarations. Those Defendants who
9 have not been dismissed under Rule 4(m) for failure to timely serve them have moved to dismiss,
10 and Plaintiffs have asked the Court to reconsider the Rule 4(m) dismissals.

11 **II. LEGAL STANDARDS**

12 Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the claim
13 showing that the pleader is entitled to relief” in order to “give the defendant fair notice of what
14 the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957).
15 A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency, *N. Star Int’l v. Ariz.*
16 *Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983), and dismissal is appropriate only when the
17 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
18 on which it rests, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

19 A court treats factual allegations as true and construes them in the light most favorable to
20 the plaintiff, *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986), but does not accept as
21 true “legal conclusions . . . cast in the form of factual allegations,” *Paulsen v. CNF Inc.*, 559 F.3d
22 1061, 1071 (9th Cir. 2009). A plaintiff must plead facts pertaining to his case making a violation
23 “plausible,” not just “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (citing *Twombly*,
24 550 U.S. at 556) (“A claim has facial plausibility when the plaintiff pleads factual content that
25 allows the court to draw the reasonable inference that the defendant is liable for the misconduct

1 alleged.”). That is, a plaintiff must not only specify or imply a cognizable legal theory (*Conley*
2 review), he must also allege the facts of his case so that the court can determine whether he has
3 any basis for relief under the legal theory he has specified or implied, assuming the facts are as he
4 alleges (*Twombly-Iqbal* review).

5 “Generally, a district court may not consider any material beyond the pleadings in ruling
6 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
7 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
8 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
9 whose contents are alleged in a complaint and whose authenticity no party questions, but which
10 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
11 motion to dismiss” without converting the motion to dismiss into a motion for summary
12 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Also, under Federal Rule of
13 Evidence 201, a court may take judicial notice of “matters of public record” if not “subject to
14 reasonable dispute.” *United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011).
15 Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss
16 is converted into a motion for summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*,
17 261 F.3d 912, 925 (9th Cir. 2001).

18 **III. ANALYSIS**

19 Congress has plenary power over the Indian tribes, *Lone Wolf v. Hitchcock*, 187 U.S. 553,
20 565 (1903), which exist as “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 U.S.
21 1, 17 (1831). As a starting point in American history, Indian tribes existed as sovereign nations.
22 *Id.* at 59–60. However, the tribes’ sovereignty has been “necessarily diminished” via conquest
23 by other sovereigns, such as England, France, Holland, Spain, and Portugal, all of whom
24 recognized the principal that a conquered people retained the right to occupy the land, but that
25 certain aspects of sovereignty became forfeit. *Johnson v. McIntosh*, 21 U.S. 543, 574–76 (1823).

1 Congressionally recognized tribes retain all aspects of sovereignty they enjoyed as independent
2 nations before they were conquered, with three exceptions: (1) they may not engage in foreign
3 commerce or foreign relations, *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); (2) they may not
4 alienate fee simple title to tribal land without the permission of Congress, *McIntosh*, 21 U.S. at
5 574; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure,
6 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), *superseded on other grounds by*
7 25 U.S.C. § 1301(2), (4) (1990). In summary, all aspects of sovereignty consistent with the
8 tribes' dependent status, and which have not been taken away by Congress, remain with the
9 tribes.

10 Because the tribes retain their sovereignty generally, and because that sovereignty
11 predates the Constitution and does not depend upon it, the Constitution does not bind tribal
12 governments with respect to their members. *Talton v. Mayes*, 163 U.S. 376, 382–84 (1896). Any
13 claims against the tribal Defendants under the United States Constitution therefore fail as a
14 matter of law. In 1968, Congress passed the Indian Civil Rights Act (“ICRA”) to provide certain
15 protections for Indians as against their tribal governments. These protections roughly parallel the
16 protections afforded by the Bill of Rights, *see* 25 U.S.C. § 1302, but the only remedy available is
17 habeas corpus, *id.* § 1303, not injunctive or declaratory relief, *Santa Clara Pueblo v. Martinez*,
18 436 U.S. 49, 58–62 (1978). Any claims against the tribal Defendants under the ICRA therefore
19 also fail as a matter of law to the extent they seek anything other than habeas corpus relief.

20 **A. The APA Claim Based on Duckwater Shoshone Tribal Ordinance 83-D-01**

21 Plaintiffs complain that Ordinance 83-D-01 was adopted contrary to required tribal
22 legislative procedures. They argue that the BIA's acceptance of the Ordinance is therefore
23 arbitrary and capricious under the APA. The Court dismisses this claim, without leave to amend.
24 The BIA's recognition of a tribal law as presented to the BIA by the Tribe cannot be arbitrary and
25 capricious. Plaintiffs do not allege the tribal government recognized by the BIA did not in fact

1 present the Ordinance to the BIA as tribal law and that the BIA fabricated the law on its own
2 initiative. Rather, Plaintiffs allege the BIA acted arbitrarily and capriciously in not further
3 investigating whether tribal legislative procedures had been sufficiently adhered to when the
4 Tribe adopted the law before determining that the law presented to it by the tribal leadership was
5 worthy of recognition. This is a matter of the internal affairs of the Tribe that the BIA (and this
6 Court) are powerless to interfere with. Not only is it not arbitrary or capricious for the BIA to
7 respect tribal law as duly adopted when so represented to the BIA by the tribal government, it
8 would constitute an impermissible meddling into internal tribal affairs for the BIA to fail to do
9 so. Moreover, the Ordinance is affirmatively alleged to have been adopted in 1983, thirty-five
10 years before the Complaint was filed, so the affirmative defense of the six-year statute of
11 limitations is evident on the face of the Complaint. *See Turtle Island Restoration Network v. U.S.*
12 *Dep't of Commerce*, 438 F.3d 937, 942–43 (9th Cir. 2006) (citing 28 U.S.C. § 2401(a)).

13 **B. The First IRCA Claim**

14 This claim is based on various Defendants' denial to Plaintiffs of a venue to file appeals
15 from tribal court decisions by withholding funding for the Intertribal Court of Appeals ("ITCA").
16 The ICRA does not apply to federal entities, only to Indian tribes, 25 U.S.C. §§ 1301(1), 1302(a),
17 and as noted, *supra*, the ICRA only provides the remedy of habeas corpus, *id.* § 1303. Because
18 the federal Defendants are not amenable to any ICRA claim, and because the claim does not seek
19 habeas corpus relief against any tribal entity, the claim cannot be cured by any set of facts
20 concerning the funding issue and is therefore dismissed, without leave to amend.

21 **C. The Second ICRA Claim**

22 This claim is based on various Defendants' alleged corrupt political practices relating to
23 tribal electoral and judicial practices. A federal court has no subject matter jurisdiction to
24 entertain a suit based on the alleged violation of the law of tribal governance, which is "an
25 internal controversy among Indians over tribal government." *Motah v. United States*, 402 F.2d 1,

2 (10th Cir. 1968). Nor is there any exception to federal sovereign immunity from suit that would permit such a suit against BIA officials. *Id.* at 2 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Plaintiffs’ complaints concern the internal affairs of the Tribe over which the Court lacks subject matter jurisdiction. *See* Felix. S. Cohen, *Federal Handbook of Indian Law* 126 (1971) (“Such power [of sovereignty] includes the right to define the powers and duties of [tribal] officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest to the authoritative character of acts done in the name of the tribe.”). A tribe may not be sued except where Congress has specifically stripped its sovereign immunity by providing for suit. *See id.* at 283–84 (quoting *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373–76 (8th Cir. 1895)); *see also* *Turner v. United States*, 248 U.S. 354, 358 (1919) (“Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent.”). Plaintiffs identify no statute permitting suit except the ICRA, the sole remedy under which is habeas corpus. Because no set of facts concerning malfeasance in tribal government will give this Court jurisdiction to interfere under the ICRA or otherwise, this claim is dismissed, without leave to amend.

D. The Declaratory Judgment Claim

Plaintiffs seek five declarations. The Court’s jurisdiction to address the merits as to any of the requested declarations must rest, if not upon a more specific statute, at a minimum on the relevant issue being a matter of federal common law relating to the Indian tribes such that the Court can address the question under 28 U.S.C. § 1331. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850–53 (1985).

First, Plaintiffs ask the Court to declare that the United States is acting unreasonably, arbitrarily, and capriciously in denying the authority of Defendant Wright to act as a judge for the Tribe. Most of the allegations actually appear to complain that Wright acted as a judge when he

1 allegedly was not properly appointed. In any case, the Court cannot adjudicate an internal tribal
2 matter of whether a tribal judge was or was not properly appointed under tribal law.

3 Second, Plaintiffs ask the Court to declare that Defendant Mike's administration's actions
4 are illegal, in violation of Plaintiffs' civil rights, and in violation of the RICO statute. As already
5 noted, the U.S. Constitution does not apply to Indian entities, Plaintiffs do not appear to seek
6 habeas corpus relief such that the ICRA might apply, and the elements of a civil RICO claim
7 have not been pled.

8 Third, Plaintiffs ask the Court to declare that the United States is bound by law to provide
9 adequate funding for the ITCA under its trust responsibility. The Court dismisses this claim,
10 because "the organization and management of the trust is a sovereign function subject to the
11 plenary authority of Congress." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174
12 (2011). If Congress had mandated certain funding, and an agency responsible for distribution of
13 the funds had failed to make disbursements as required by statute, that would be another matter,
14 *id.* at 177, but Plaintiffs have not alleged such facts. Rather, Plaintiffs argue that the United
15 States' refusal to fund the ITCA in the first instance is a violation of its trust duties, which is a
16 non-justiciable political question. *Id.* at 174 (collecting cases).

17 Fourth, Plaintiffs ask the Court to declare that the BIA has since March 22, 2018
18 unlawfully and unreasonably denied the Eastern Nevada Tribes the right to file appeals in the
19 ITCA. This claim is redundant with the previous claim. Plaintiffs do not appear to argue that the
20 BIA has wrongly interfered with the operation of the tribal courts, e.g., by usurping the operation
21 of a functioning tribal court and refusing to permit members of certain tribes from filing appeals
22 therein. Rather, Plaintiffs appear to argue that the failure to fund the ITCA has had the result of
23 causing that court to be unable to operate (the tribes themselves presumably have also refused to
24 fund the ITCA from their own treasuries), and hence, the Eastern Nevada Tribes have not been
25 able to file appeals in that forum. The Court dismisses this claim for the same reason it dismisses

1 the previous claim. *See id.*

2 Fifth, Plaintiffs ask the Court to declare that Plaintiffs have no ethical, fair, and unbiased
3 court in which to file appeals. The Court dismisses this aspect of the claim, which is a dispute
4 concerning the internal, political affairs of the Tribe, without leave to amend.

5 In summary, the declaratory judgment claim is dismissed, with leave to amend to allege
6 that the BIA (or another agency) has failed to comply with a particular law or regulation
7 requiring funding for the ITCA. Plaintiffs may also amend to plead a separate RICO claim
8 against individual Defendants, if they wish.

9 Finally, because the Tribe is immune and therefore cannot be joined involuntarily, and
10 because the Tribe is a necessary, indispensable party under Rule 19, the entire case must be
11 dismissed under Rule 12(b)(7). *Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022–25 (9th
12 Cir. 2002). A tribe’s interest in sovereign immunity so greatly outweighs a plaintiff’s interest in
13 litigating his claims that there is “very little room for balancing of other factors” under Rule
14 19(b) in such cases. *Id.* at 1025. This does not necessitate denial of leave to amend, because an
15 amended complaint could potentially state claims against non-immune Defendants in a way not
16 necessitating joinder of the Tribe itself.

17 The Court grants the motion to reconsider the 4(m) dismissals, except as to Defendant
18 Wright. Plaintiffs note that they did in fact serve the dismissed Defendants (minus Wright) but
19 neglected to timely file proof of service. The Court finds this neglect to have been excusable for
20 *pro se* Plaintiffs. Plaintiffs have attached their proof of service to the motion. The Court makes
21 no substantive ruling at this time as to the sufficiency of service but finds excusable neglect in
22 failing to file proof of service. The result in the present context is that Plaintiffs may name in an
23 amended complaint any parties previously dismissed under Rule 4(m) (except Wright), within
24 the scope of the claims for which Plaintiffs have been given leave to amend. *Cf. Del Raine v.*
25 *Carlson*, 826 F.2d 698, 705 (7th Cir. 1987). The Court needn’t vacate the previous order.

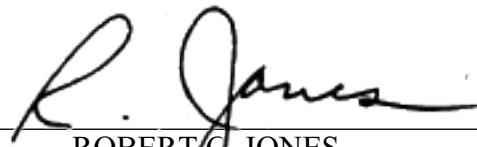
1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 10, 13) are
3 GRANTED, with leave to amend in part. Plaintiffs may amend the declaratory judgment claim
4 to allege that the BIA (or another agency) has failed to comply with a particular law or regulation
5 requiring funding for the ITCA or to allege a separate RICO claim. If Plaintiffs do not amend
6 within twenty-eight (28) days, the Court may dismiss the entire case with prejudice without
7 further notice.

8 IT IS FURTHER ORDERED that the Motion for Reconsideration (ECF No. 26) is
9 GRANTED IN PART. To the extent Plaintiffs seek to name in an amended complaint any
10 Defendants previously dismissed for failure to serve, they may do so, with the exception of
11 Defendant Wright.

12 IT IS SO ORDERED.

13 DATED: This 7th day of November, 2018.

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16 ROBERT C. JONES
United States District Judge
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